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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1139

Carmen Ruth Burnett ..... *Petitioner*

vs.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at *Burnett* v. *State*, 262 Ark. 235, ____ S.W. 2d ____ (September 26, 1977).

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether Rule 22.1(a) of the Arkansas Rules of Criminal Procedure violates the guarantee of a fair trial implicit in the

Fourteenth Amendment by providing for waiver of defendant's motion for severance if not timely filed.

ARGUMENT

The petitioner in this case is actually making two alternative contentions. Through her "Statement of the Case" she alleges that the objection to joinder orally offered by her codefendant's attorney, Mr. Ridgeway (T. 255), was made on behalf of both defendants (petitioner's brief, p. 8). On the other hand she alleges that if the motion to sever was not timely made on her behalf, that the constitutional guarantee of a fair trial required the judge to sever on his own motion at trial because of manifest prejudice. Neither of these contentions merit review by this court.

A.

The issue of whether objection to joint trial was timely made has been considered and completely disposed of by the Arkansas Supreme Court. 262 Ark. at 236. But in order that this Court will not be misled by the affidavits attached to petitioner's brief, the record should be reviewed one more time.

The record reflects that the trial court joined the offenses and the defendants on its own motion pursuant to Rule 23 of the Arkansas Rules of Criminal Procedure (set out in petitioner's brief, p. 5). After the court announced this intention, the following discussion took place:

> "THE COURT: Now, gentlemen, these four cases, as far as this court is concerned are set for trial on July 6. Any questions?

> MR. ANDERSON [attorney for Carmen Burnett]: None at all from the defendant.
>
> MR. RIDGEWAY [attorney for Samuel David]: Would the court be too upset, Your Honor, if we filed a written motion for severance?" (T. 255)

A written motion for severance was filed and the first paragraph of that motion read as follows:

> "Comes now the defendant, Samuel Edward David, by and through his attorneys Mark P. Clark and Robert D. Ridgeway, and for his motion for severance of defendants, alleges and states:" (T. 50)

There are no objections on the record made by petitioner's attorney (Mr. Anderson) to the joinder, nor is there any indication that the motion for severance filed by co-defendant Samuel David was on behalf of the petitioner. It was apparent throughout the trial that the two co-defendants were not cooperating with each other on any phase of their defenses. This was put into the record in the following exchange:

> "MR. WRIGHT [Prosecuting Attorney]: Now, whether or not — this is strictly for the benefit of Mr. Anderson and Mr. Ridgeway — we felt like — do either one of you want it pointed out that you are not conducting a joint defense?
>
> MR. ANDERSON: I'm certainly not conducting a joint defense with anybody.
>
> MR. RIDGEWAY: No, we're not conducting any joint defense with anybody either." (T. 1175)

Therefore, notwithstanding the affidavits of Mr. Clark and Mr. Anderson (there is not one from Mr. Ridgeway), it is apparent that there was no motion for severance, timely or otherwise, made on behalf of petitioner either before or during trial.

B.

The petitioner's primary contention concerning the constitutionality of Rule 22.1 of the Arkansas Rules of Criminal Procedure is equally without merit.

The Fourteenth Amendment's requirement of a fair trial does not place a duty on the State or on the trial court to direct the defendant's defense. In the present case ample opportunity was given for petitioner's attorney to object or move for severance on the ground of necessity to call the co-defendant as a witness. There is, however, no indication at any point in the record that petitioner expressed any intention or desire to call the co-defendant as a witness.

The petitioner cites *United States* v. *Echeles*, 352 F. 2d 892 (7th Cir. 1965) as providing that defendants should be severed for trial to allow one defendant the opportunity to question the other. However, in that case the conviction was reversed because the court refused to sever after the filing of a timely motion by the defendant with the grounds, including necessity to call a co-defendant, listed in the motion. 352 F. 2d at 897.

It is easy for a defendant who has gone to trial and lost to examine his case with perfect hindsight and see a more probably successful defense. However, it is not the duty of a trial court to attempt to lead the defendant to this defense. This Court has so ruled in a case with a similar issue. In *Logan* v.

United States, 144 U.S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1892) the Court held:

> "Having gone to trial, without objection, on the indictment as consolidated under the last order of the court, it was not open to take the objection for the first time after the verdict." 144 U.S. at 297

Similarly in *Bucklin* v. *United States*, 159 U.S. 682, 16 S. Ct. 182, 40 L. Ed. 305 (1895) the Court held:

> "But as it does not appear that the plaintiff in error objected at the time to being tried by the same jury with the other parties indicted, nor that he excepted to the order of consolidation, we need not consider whether that order, if objected to seasonably, could have been properly made." 159 U.S. at 685

If petitioner's reasoning were followed, trial courts would be under a continuing duty not only to maintain a fair trial which follows acceptable due process standards, but to also seek the most effective course for a defendant to pursue. Under such reasoning a trial court would commit error *unless* it interfered with the tactics of defense attorney wherever another line of defense could conceivably be more successful.

In *United States* v. *Infusino*, 130 F. 2d 561 (7th Cir. 1942), the defendant alleged that the court had committed error by not severing his trial from that of his co-defendants. The Seventh Circuit Court noted that in that case, as in the present case, the defendant did not avail himself of the opportunity to object to consolidation either before or during trial. The court continued:

"It was the duty of the defendant to challenge the court's attention to the procedure if it was wrong, and procure the court's ruling thereon before he could complain of error. *Until that time, the court had had no chance to commit error.* The objection cannot be presented here for the first time." (emphasis added) 130 F. 2d at 562.

Therefore, due process and the requirement of a fair trial does not compel a trial court to do that which he has not been asked to do. Prejudice must be actual and manifest to compel action by this court; the mere fact of a greater chance for acquittal is not of itself adequate grounds for severance. *United States* v. *Rosa*, 404 F. Supp. 602 (W.D. Pa. 1975); *United States* v. *Guy*, 456 F. 2d 1157 (8th Cir. 1972), cert. den. 409 U.S. 896, 93 S. Ct. 136, 34 L. Ed. 2d 153.

CONCLUSION

This Court should deny the petitioner's application for a Writ of Certiorari where the specifics of the argument, the circumstances, and the law deny its efficacy as a claim of merit or demanding of this Court's review.

Respectfully submitted,

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